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Supplemental Brief for Plaintiff in Error.

In the

Supreme Court of the United States.

October Term, 1904.

No. 73.

THE FIRST NATIONAL BANK OF JACKSBORO, PLAINTIFF IN ERROR,

vs.

J. L. LASATER, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

J. W. NICHOL,
Attorney for Plaintiff in Error.

THOS. D. SPORER.
E. W. NICHOLSON.
Of Counsel.

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I.

We ask the indulgence of the Court in presenting a supplemental brief, as there are some authorities we have examined since our original was filed which we believe have a bearing on the case in judgment, and to which we wish to call attention.

We endeavored in the original brief to plainly present the question as to the rights of J. L. Lasater, the defendant in error here to sue for and recover usurious interest alleged to have been collected by the plaintiff in error, viz.: The First National Bank of Jacksboro. Our contention was—and is now—that upon the facts shown by the record the defendant in error has no right to sue for the alleged usurious interest, and under no circumstances, as developed by the evidence, has he a standing in court.

We said that if the claim, being based upon a penalty, was non-assignable, his partner, W. M. Haggard, had an ownership of one-half of the amount of usurious interest paid before the dissolution of the partnership. Indeed, he (Haggard) says (transcript, p. 26) in speaking of selling his partnership interest: "In said trade I did not sell my right, or any

right, to J. L. Lasater to sue the First National Bank of Jacksboro, Texas, or any one else for a penalty for charging usurious interest; nothing of this kind was mentioned to me by said J. L. Lasater or any one else, and I did not sell any such right of action. If there ever was any such right it belonged to me."

This fact is not controverted and nothing in the record is shown to the contrary. We are well aware that the Court will not reverse a case on the mere weight of evidence, but when all the facts show that an incorrect decision has been rendered, the testimony offered, will be considered.

We further contended in our first argument offered, that if assignable, the defendant in error had parted with all his interest to the claim in question to his surety, A. M. Lasater, who was not only a surety but a joint maker of the original note.

Moreover the defendant in error did not pay the final instalment of usurious interest which he now seeks to recover.

It is shown by the record that the defendant in error here, on the 15th day of October, 1900, sold all of the partnership cattle to his surety, A. M. Lasater, who assumed the payment of the debt owing to the bank, and gave his own note in lieu of it, and it is further shown by the record that defendant in error filed his voluntary petition in bankruptcy November 19, 1900, but did not mention this claim for usuary and did not schedule it, and was discharged free from all debts or liabilities January 7, 1901, and the final payment of interest, usurious or otherwise, was not made by the surety until June, 1901, eight months after his sale of all interest in the partnership assets, and six months after his discharge in bankruptcy. It is difficult to see on said facts—which are not only not controverted but admitted—upon what hypothesis the defendant in error has any right of action or any pretense thereof. It can hardly be assumed that the surety would have left a claim for usurious interest in the hands of the principal when he was paying the entire debt. He would have raised the question and considered it.

But the gravamen of the matter involved in this controversy is whether the defendant could secretly retain a penalty after his various dealings with his partner, his surety, and the bank.

We have cited in our original brief Monongahala Nat' Bank *v.* Overholt, 96 Pa. St., 327; Farmers' and Mechanics. Savings Co. *v.* Bozee, 14 S. W. Rep., 443, and McFerrin *v.* Woods, 3 Baxt (62 Tenn.), 242.

We refer now to the the case of Bullard *v.* Raynor, 30 N. Y., 197, wherein the court held that "Usury is a defense personal to the party known as the borrower; he cannot transfer to another the right he has to allege and prove the demand to be usurious.

This case differs from the one at bar in this, that there was a public assignment, and in the case we are treating there was a concealed asset which the defendant in error intended to make available after he had been free from all obligations to pay his just debts.

We also referred to the case of Pardoe *v.* First. Nat. Bank, 5 Kan., App. 512. It should have been Lloyd *v.* First Nat. Bank, 5 Kan. App., 512, which decides that "a cause of action for usurious interest paid to a national bank in a note given for a loan is not assignable.

The case of Pardoe *v.* Iowa National Bank, 106 Iowa, 345, decides that "The right conferred by the United States Revised Statutes, sec. 5198, upon a debtor from whom usurious interest has been exacted by a national bank, or its legal representatives to recover back twice the amount is personal and cannot be transferred by ordinary sale or judgment." The Court says: "It is a well-settled rule that a defense based upon usury is personal and cannot be maintained by a stranger to the contract. Citing Carmichael *v.* Bodbish, 32 Iowa, 418; Miller *v.* Clarke, 37 Iowa, 325; Insurance Co. *v.* Olmstead, 37 Iowa, 854.

That is not altogether our case. By law a claim for usurious interest owned by a bankrupt is a thing of value and belongs to his creditors and becomes an assignable quantity to a trustee or assignee under a State insolvent

law or a Federal law in bankruptcy, and so the courts hold.

We deem it unnecessary to more than refer to the rule that a penal statute must be strictly construed. The authorities cited by counsel for plaintiff in error in preparation of application for writ of error, pp. 50, 51, of the record fully sustain such rule.

II.

We believe we have clearly shown in our original brief that under the Bankrupt Act of July 1, 1898, all of the assets of the latter pass to the trustee, nevertheless there are some authorities bearing upon this question to which we wish to call to the attention of the Court.

The Supreme Court of Connecticut, in a well considered case, Loomer *v.* Loomer, 76 Conn., 522, held that " Beneficial interests and not wholly unrestrained and under the control of the beneficiaries of a will are alienable and may be subject to the rights of creditors, and that equitable interest pass to the master in bankruptcy.

This is a case where two sons of a testator at the time of their application as bankrupts were each, as *certui que trust*, entitled to one-eighth of the net income of a trust estate during the continuance of the trust to pay income and were each the owner of an equitable remainder in fee to an undivided one-eighth of the trust estate, with the right to have the full legal title thereto upon the termination of the trust. The court held as above stated, and such interest passed to the trustee in bankruptcy.

The question, however, to be determined here is, whether a bankrupt, having been divested of his title to all of his assets, and concealing a part of them, can, after his discharge, become revested with the assets he has concealed? We endeavored in our original brief to make it clear that such playing fast and loose with assets was not consistent with equity and good conscience, and we referred to some decisions sustaining our contention. We now wish to call attention to some additional authorities on the subject which we have examined.

The courts have never looked with leniency on the concealment of assets, and parties concealing them have not as a rule been allowed to retain them when the right to their ownership was questioned.

In re Paine 127 Fed. Rep. 246, Evans J., it was decided that "a trustee may bring a suit or file a petition within a reasonable time to reopen the case if the bankrupt has fraudulently concealed assets."

In the case of *in re* Morrison 127 Fed. Rep. 186, it was held that "where a member of a firm filed a petition individually to be adjudged a bankrupt, and the petition was silent as to partnership assets and liabilities, though the schedule declared individual and partnership debts, and the creditors of the firm were not notified, the bankrupt was not entitled to a discharged from firm debts, though the firm had been dissolved and was without assets and the firm debts were barred by limitation.

It was decided in case *in re* Fiergenbaum 121 Fed. Rep. 69, "that a bankrupt who has been refused a discharge of fraudulent concealment of assets from the trustee may not a few months thereafter file a new petition alleging the same facts and prevent a new application for a discharge."

In Fowler *v.* Jenks 95 N. W. Rep. 887, it was held that "where a bankrupt estate was reopened for the reason that the bankrupt had fraudulently concealed certain property, the effect was to place the parties in the same relation they were before the estate was closed and the bankrupt discharged, and the title to the concealed property did not revest the bankrupt after his discharge so as to deprive the court of jurisdiction upon the reopening of the estate."

The cases are cited for the purpose of showing that the almost uniform decisions of the courts are that after having been once divested of assets by bankruptcy proeeedings, concealed assets do not revest after discharge.

The case of Scruby *v.* Norman, 91 Mo. App. 517, is still more explicit in giving the status of a bankrupt after his discharge in regard to concealed assets. It is directly in point and sustains our contention. It is in line with the

decision of the Supreme Court of the United States in which we have referred, p. 16 of our former brief and with the cases of Monongahalia Nat. Bank, 96 Penn. St., 327, and Rand *v.* Iowa Central Railway Co., American Bankruptcy Rep., Sept., 1904, 164 *supra.*

In the case of Scruby *v.* Norman, *supra*; a party brought suit upon a promissory note and upon a trial of the case a judgment was rendered for the defendant. The plaintiff then under Act of July 1, 1898 filed a petition and was adjudged a bankrupt, and a trustee was appointed who took charge of his estate, and neither received or paid out any money and was discharged. The debt in question upon which the suit had been brought was not scheduled. After plaintiff's discharge in bankruptcy he appealed from the judgment which had been rendered against him, and the defendant moved to dismiss the appeal on the ground that all the right, title and interest to the debt in question had passed to the trustee in bankruptcy, and he could not prosecute the appeal. In other words, having been divested of his title by his application and discharge in bankruptcy—all of his property having passed to his trustee—he could not after his discharge revert the title in himself.

The court dismissed the appeal. Smith, P. J., speaking says: "It is made manifest by the record of the proceeding of the Federal Court in the bankruptcy case that the interest of the plaintiff in the debt sued for in the present action was, by operation of law, transferred to the trustee of the estate." (Bankrupt laws of 1898, sec. 70. * * *) The interest of the plaintiff in the said debt having been divested by the bankrupt proceedings his right to prosecute this action for the recovery thereof was at an end. Unless that interest had been revested he can have no *locus standi* in the present appeal.

"Will the fact that said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have himself substituted as plaintiff in this suit, have the effect, after his discharge and that of the plaintiff as a bankrupt, to

revest in the latter, the interest that was divested by the bankrupt proceedings. That such would be the effect would be inconceivable."

We will not quote the court's reasoning in full. It sustains our contention in every particular. The learned presiding judge cites in conclusion: Malone *v.* Martin, 5 S. W, Rep., 909; Pickens *v.* Dent, 106 Fed. Rep., 653; Vandyke *v.* Shyrer, 98 Ind., 126; Boyd *v.* Adams, 82 Ind., 294; Seaton *v.* Hinsman, 50 Iowa, 395, Dessau *v.* Johnson, 66 How. Proc., 5; Atwood *v.* Thomas, 60 Miss, 162; Peters *v.* Wallace, 4 S. W. Rep., 914; Foraast *v.* Hyman, 28 N. E. Rep., 801.

Contra Frazier *v.* Desha's Admr., 40 S. W. Rep., 678.

We have examined the cases cited by the Missouri court, and with the exception of Frazier *v.* Desha's Admr. noted they sustain the position taken, and when the facts in the latter case are considered it cannot be regarded as an authority against the principle for which we have been contending.

The case of Malone *v.* Martin, 2 S. W. Rep., 909, decides that even where the assignee of a bankrupt is barred from asserting a title that fact does not revest the bankrupt with title.

The cases of Atwood *v.* Thomas, 60 Miss., 162, and Foraast *v.* Hyman, 28 N. E., 801 are almost directly in point, and they decide in effect that the title of a bankrupt once divested and invested in his trustee cannot be revested in himself after discharge. He is forever barred.

In the case of Peters *v.* Wallace, 4 S. W. Rep., 914, the court held that "The mere fact that the assignee in bankruptcy declines to sue for land claimed by the bankrupt or has really surrendered his right to do so, does not invest the bankrupt with title sufficient to support an action of ejectment by him."

We deem it unnecessary to further review the several questions presented by the record. We have carefully con-

sidered all phases of the case in judgment, and we believe upon every hypothesis the assignments of errors are well taken.

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